

STATE OF MICHIGAN
COURT OF APPEALS

3333 CENTERPOINT PARKWAY
INVESTMENTS LIMITED PARTNERSHIP,
3555 CENTERPOINT PARKWAY
INVESTMENTS LIMITED PARTNERSHIP, and
ETKIN EQUITIES, INC.,

UNPUBLISHED
March 28, 2006

Plaintiffs-Appellants,

v

BRIAN J. FORSTER and DANIEL R. STEFFES,

No. 265727
Oakland Circuit Court
LC No. 04-056615-CK

Defendants-Appellees.

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order denying their motion for summary disposition and granting summary disposition to defendants. We affirm.

This case arose out of the construction of two hotels. Plaintiffs are the owners, and they entered into a contract with Olympic Corporation as the general contractor to build those hotels. Defendants were officers of Olympic. One of the subcontractors was D & M Industries, Inc. According to the complaint, plaintiffs paid Olympic for work and materials, and defendants diverted some of the funds intended for subcontractors, including D & M. The allegation of diverting funds is based on a May 20, 1998 letter informing plaintiffs that Olympic was withholding payment to D & M “pending resolution of change orders and backcharges.” D & M filed a construction lien against plaintiffs, which resulted in an award of the full amount of the lien, costs, interest, and attorney fees. On February 12, 2004, plaintiffs paid D & M in exchange for an assignment to plaintiffs its interest in any claims it had against defendants and Olympic under the Builder’s Trust Fund Act (BTFA), MCL 570.151 *et seq.* Plaintiffs then commenced this suit against defendants, alleging common law fraud and violation of the BTFA. On October 15, 2004, approximately seven months after the complaint was filed, plaintiffs and D & M amended their assignment to assign without limitation any claims D & M had arising out of the construction project.

There is no dispute that plaintiffs’ posture in this case is solely that of D & M’s assignee. Causes of action are generally freely assignable and the assignee acquires the rights and stands in

the shoes of the assignor. *Professional Rehabilitations Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

We need not consider most of the issues raised on appeal because we conclude that the applicable statutes of limitations barred this action. This is a dispositive issue of law for which all necessary facts have been presented, so we may consider it even though it was not raised below. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

The first assignment between plaintiffs and D & M only granted to plaintiffs claims arising out of the BTFA. Thus, at the time plaintiffs filed their complaint, they could not assert any other claims as D & M's assignee. The BTFA is a criminal statute, but "the common law on its own hook provides a remedy." *B F Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966); *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 48; 631 NW2d 59 (2001). The BTFA is Depression-era measure intended to supplement the Mechanics' Lien Law and "to afford relief to subcontractors and materialmen in the construction industry" by providing "a more effective remedy for private project suppliers against their principal contractors than they had previously." *Nat'l Bank of Detroit v Eames & Brown, Inc*, 396 Mich 611, 619-620; 242 NW2d 412 (1976), quoting *General Ins Co of America v Lamar Corp*, 482 F2d 856, 860 (CA 6, 1973). "The purpose of the Act is to create a trust fund for the benefit of materialmen and others under private construction contracts. This is in addition to the rights granted pursuant to the mechanics lien statute. . . . They are two separate protections, providing two distinct avenues of relief to the unpaid laborers and materialmen." *Nat'l Bank of Detroit*, *supra* at 622. Thus, "the Act was designed to protect both subcontractors and owners from financially irresponsible general contractors by creating an alternative to the mechanic's lien laws, which were deemed by the legislature to provide inadequate protection to subcontractors while at the same time unfairly encumbering owners' property." *Koppers Co, Inc v Garling & Langlois*, 594 F 2d 1094, 1100 (CA 6, 1979).

The civil cause of action under the BTFA is therefore a remedial measure. Unpaid subcontractors are provided an alternative to using a lien to obtain payment from their general contractors. Blameless owners are provided some protection against encumbrances being placed on their property. However, the BTFA did not replace subcontractors' lien-based remedies. Significantly, D & M actually exercised their lien remedy in its arbitration action against plaintiffs. D & M prevailed in that action and was paid. Thus, D & M's assignment of its rights under the BTFA was no more than an assignment of an avenue to relief that had already been obtained. As D & M's assignee, plaintiffs can obtain no more than what D & M would be entitled to receive. Because D & M obtained its relief, it could not now seek a double recovery from defendants. The BTFA assignment was functionally a nullity, and it gave plaintiffs no interest in a claim they could bring against defendants.¹

¹ We are not presented with the question of what cause of action, if any, plaintiffs might have been able to bring against defendants in their own right.

Whether D & M's remaining claims sounded in contract² or in some other personal action like fraud or conversion, the applicable period of limitation is six years. MCL 600.5807(8); MCL 600.5813. Plaintiffs could only have acquired the right to pursue those remaining claims through the October 15, 2004 amended assignment. Defendants' alleged wrongdoing must have taken place before or contemporaneously with their May 20, 1998 letter stating that they were withholding funds. The period of limitations begins running when the claim accrues, which is typically "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. By the time D & M assigned their rights to any claims other than their BTFA claim, more than six years had passed since those claims had accrued. Plaintiffs' filing their complaint could not have tolled the limitations period as to those claims, because plaintiffs had not yet "stepped into D & M's shoes" at that time.

Plaintiffs' rights are functionally indistinguishable from those of a subrogee. In general, the pendency of a prior cause of action between the subrogor and a defendant tolls the statute of limitations, and if the "prior action has ended without an adjudication on the merits, the tolling statute is applicable to a renewed action by a different plaintiff who represents the same interest as the original plaintiff." *Federal Kemper Ins Co v Isaacson*, 145 Mich App 179, 183-184; 377 NW2d 379 (1985). The record shows that D & M participated in a prior lawsuit that included, among many other claims between many other parties involved in the hotel construction, a claim by D & M for breach of contract against Olympic and against defendant Forster. That suit was ordered into binding arbitration, with D & M's concurrence. D & M's claims were resolved in an arbitration award that the circuit court confirmed as a final judgment. Therefore, any of D & M's assigned claims that were included in the prior litigation have been resolved, not tolled. D & M took no other actions to toll any remaining claims. Therefore, by October 15, 2004, D & M had no claims that it could assign to plaintiffs. We need not reach any of the other issues.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

² "The enforcement of the lien through foreclosure is a cumulative remedy that may be pursued simultaneously with an action on the contract from which the lien arose." *Dane Constr, Inc.*, *supra* at 293; MCL 570.1117(5).